A guide to navigating legal issues concerning your children on separation

Winckworth Sherwood

Winckworth Sherwood Family Guide

This guide is intended to provide some guidance in relation to navigating legal issues concerning your children on seperation. It includes information on:

- the automatic rights of parents
- the Orders Courts can make
- key considerations of the Court
- the procedure of going through the Courts
- what happens if the Order is ignored

If you would like to discuss anything raised in this guide, our experienced family law team is here to help. Their contact details can be found on the final page.

For more information, please visit
wslaw.co.uk/family

Divorce Clinic

We offer free 30 minute meetings at our offices or over the telephone to anyone wishing to discuss a family issue. If you, a friend or a colleague have a query relating to a relationship, potential marriage or cohabitation, a potential separation or divorce, or issues concerning children, arrange to speak with one of our qualified and experienced family lawyers for an initial chat to consider your options and the best route forward.

To check availability and make a booking, please visit wslaw.co.uk/divorce-clinic. Our offices are based in London Bridge, and meetings are held privately and in the strictest confidence.

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Relationship breakdown is never easy, and can be especially emotive where there are children involved.

If you can, try to agree the arrangements for your children between you, or with the help of a neutral third party. Even with the best intentions, sometimes it becomes necessary to turn to the Court to regulate arrangements.

The paramount consideration for the Court when making orders concerning children is what will be in that particular child's best interests. It will be guided by specific factors, known as the 'welfare checklist', which are set out in section 1 of The Children Act 1989. These include (but are not limited to):

- The wishes and feelings of the child involved;
- The child's physical, emotional and educational needs, as well as your ability to provide for those needs;
- The child's age, sex and background; and
- Any harm the child has suffered or is at risk of suffering.

There is a presumption that, unless the contrary is shown, the involvement of a parent in the life of the child will further the child's welfare.

Any decision made by the Court should also be made without delay and the Court will only intervene if it is beneficial to the child's welfare for an Order be made.

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Do I have the right to decide?

Certain people do have automatic rights in relation to decisions about children, and this is defined as having "parental responsibility". Parental responsibility is defined as all the rights, duties, powers, responsibilities and authority which by law the parent of a child has in relation to that child.

If you have parental responsibility for a child, then you will automatically have the right to have a say in major decisions about that child's life. For example, where they will live or where they will go to school. This does not mean that you can always interfere with day-to-day decisions, such as what the child will wear or what hobbies they will undertake.

Do I have Parental Responsibility?

All birth **mothers** automatically have parental responsibility. However a **father** will only have parental responsibility if they were married to the mother at the time of the child's birth or if they were registered on the birth certificate.

A father can also acquire parental responsibility by marrying the mother after the child's birth, by re-registering the child's birth to add his name to the birth certificate (provided that no father has previously been named and the mother consents to the re-registration), by entering into a legal agreement with the mother or by court order.

Court

Step-parents do not automatically have parental responsibility for their step-children however they may acquire parental responsibility for them by entering into a parental responsibility agreement. Parental responsibility can be acquired by other individuals who are not either parents or step-parents if they are appointed as a guardian or special guardian of the child, or if there is an Order in place that provides for the child to live with them.

Whether you have parental responsibility will impact your ability to apply for certain Court Orders.

What is the starting point if we cannot agree arrangements for our children?

Parents who are unable to agree on arrangements should take advantage of alternative methods of dispute resolution before they seek assistance from the Courts. This could include:

- mediation;
- family therapy and/or coaching; or
- parenting coordination.

If you think any of these options may work for you, we have close links with individuals and organisations offering these services that we can direct you towards.

What is parenting coordination?

Parenting Coordination is a concept that is widely used in the USA but relatively new in England. It is a child-focused dispute resolution process designed to assist high-conflict families in implementing parenting agreements and child arrangements.

A Parenting Coordinator will work with a family to resolve disputes by educating parents about children's needs, helping them to reach consensus where possible and, if necessary and with the prior agreement of the parties, making decisions on disputes. The process is designed to minimise the levels of conflict to which the child is exposed and to assist the parents to find new ways of co-parenting their child going forward.

If none of the above works, or is not right for your case, then you can issue proceedings under the Children Act.

What issues can the Court decide?

Child Arrangements

Care arrangements for children, often referred to as custody agreements, are known in England as Child Arrangements Orders ('CAO'). A CAO can cover a wide range of issues, the most common being where the children are to live and how and when they will spend time with the non-resident parent.

A CAO will not specify the location where the child is to live but rather with whom the child will live. A CAO can provide, and often does, for the children to live with more than one person in which case it will specify the time that they will live in each household.

If a CAO concerning who the child is going to live with is made, the non-resident parent is still able to exercise their parental responsibility independently of the resident parent. A 'lives with' order in favour of one parent does not prevent the child from spending time overnight with the other.

A CAO in relation to who the child is to spend time with will set out how and when the child will spend time with the non-resident parent. Spending time with the child or children can be through regular overnight or daytime visits, and/or indirectly through mediums such as Skype or Facetime.

Specific Issue

It is also possible to apply to the Court for a Specific Issue Order which involves the court deciding on a specific dispute between the parties. For example, whether the child should go to a certain school, or what surname the child should be known by.

Prohibited Steps

A Prohibited Steps Order will prevent a specific course of action being taken in relation to a child, such as removing the child permanently from their school or leaving the country without the other parent's consent.

Who can apply?

It is not just the parents of the child who can apply for a Child Arrangements, Specific Issue or Prohibited Steps Order. Anyone who has acquired parental responsibility for the child or has a 'lives with' Order in their favour may also apply. If you do not fall into any of these categories, you may still apply for one of these orders but will first need to apply to the Court for permission to make the application.

What's the procedure?

While every effort should be made to stay away from the courtroom, sometimes resolution is not possible and the only route is to ask for the Court's intervention. There are various stages in a standard case with no complicating factors:

1. **MIAM:** Before an application for a CAO can be made, you must first attend a Mediation Information and Assessment Meeting (MIAM). This is conducted by a mediator who will assess whether mediation is appropriate for your situation. Attending the MIAM before issuing proceedings is compulsory but further mediation is not. A MIAM is not a pre-requisite in cases of domestic abuse or urgency.

2. **Application to Court:** The process will begin with an application to Court specifying the order being sought. The applicant will need to list all the people with parental responsibility in the application, and they will have the opportunity to respond.

3. **First Hearing and Dispute Resolution Appointment ('FHDRA'):** The FHDRA helps the parties to narrow the issues and reach agreement if possible. Often, a CAFCASS Officer is available at the first hearing to assist. The CAFCASS Officer is an independent child expert appointed by the Court who will meet with the parents and children separately and make recommendations as to what is the child's best welfare interests, and to identify any welfare concerns.

4. **Dispute Resolution Appointment ('DRA'):** If no agreement is reached at the FHDRA the matter will progress to a dispute resolution appointment. The Court will identify key issues and guide the parties to reach an agreement which will often (but not always) be based on the recommendations of the CAFCASS Officer or other expert's report.

5. **Final Hearing:** If the DRA is unsuccessful, the case will progress to a final hearing where the Court will decide the issues after hearing evidence from the parties (and potentially other witnesses or experts, depending on the issues) and then make an Order based on the principles set out above.

Frequently asked questions

What happens if the Order is being ignored?

The Court does have wide powers of enforcement including compensation for financial loss, payment of a fine, committal to prison (although in reality these are rarely used) and it may even consider a change of residence if Orders are being flagrantly flouted. It is rare for the Court to impose such punitive measures and it will do so if the only way to meet the child's best welfare interests is to intervene.

What about Grandparents' rights?

Under the present law, grandparents have no automatic right to bring legal proceedings concerning care arrangements for their grandchildren - or indeed any court application that concerns significant decisions regarding the children. Grandparents must therefore apply to the courts for permission to make such an application, which is an arduous and costly process. Only once grandparents have been able to persuade the court of their meaningful relationship with their grandchild can they then apply to the court regarding arrangements for their care. Even then, there is no guarantee that the latter application will be successful.

Can I take my child on holiday without telling my ex?

It is always advisable for parents to keep each other informed of plans they have for their children in order to maintain an effective co-parenting relationship. If you are planning to take your child abroad, then you must get the permission of everyone with parental responsibility for that child prior to doing so. Surprisingly to some, failure to do so could amount to child abduction.

Court Order

If there is a court order in place which sets out who the child lives with and spends time with, and it specifies that the child "lives with" you, if the proposed holiday falls within the child's designated time with you, then you can take the child out of the UK for up to 28 days without first seeking the other parent's consent. It is, however, important to give the other parent full details of the holiday including the dates, flight times and numbers, and the address of the accommodation.

It is worth noting that, in addition to the above, some countries have onerous border entry requirements to safeguard against child abduction and trafficking which could result in your being refused permission to fly or turned away at the border for non-compliance. These include travelling with the child's birth certificate or with a sworn affidavit from the other parent consenting to the trip.

Our core team

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Hannah has a wide range of experience working on both children and financial matters, including relocation cases and complex financial remedy proceedings.

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Our Family Team is part of Winckworth Sherwood's Private Business and Wealth group, which provide a range of legal services to support individuals and their business interests, including:

- Tax and estate planning
- Succession planning
- Probate
- Trust management
- Family law
- Philanthropy
- Family office services
- Employment
- Commercial and residential real estate
- Dispute resolution
- Reputation management
- Cyber security
- Data protection
- Corporate and transactional advice

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